

LEOBARDO CHAVEZ
aka RUBEN GONZALEZ
Claimant

Docket No. 196,654

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 6 percent loss of use of the left arm and shoulder. The Administrative Law

Judge also found claimant's average weekly wage on the date of accident was \$442.80. Claimant requested the Appeals Board to review the following issues:

- (1) What is the nature and extent of claimant's injury and disability?
- (2) What is claimant's average weekly wage?
- (3) Did the Appeals Board err by permitting counsel for the respondent and its insurance carrier to personally appear at oral argument?
- (4) Should respondent be prohibited from using a videotape showing claimant working after his termination from respondent's employment to impeach claimant's testimony?

Those are the only issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Decision and Order Nunc Pro Tunc entered by the Administrative Law Judge should be modified with respect to claimant's average weekly wage.

The parties stipulated that claimant on December 9, 1994, sustained personal injury by accident arising out of and in the course of his employment with the respondent. The Administrative Law Judge found the work-related accident caused permanent injury and a 6 percent functional impairment to the left arm and shoulder for which claimant was entitled to receive permanent partial disability benefits under the "scheduled" injury statute, K.S.A. 44-510d.

- (1) What is the nature and extent of claimant's injury and disability?

Claimant contends he is entitled to permanent partial general disability benefits as computed under K.S.A. 44-510e. Claimant alleges he sustained injuries to the left upper extremity, left shoulder, and back.

On the other hand, respondent contends the Administrative Law Judge's Decision should be affirmed because claimant has sustained a scheduled injury only.

The only physician to testify and place claimant's permanent injury and impairment into the back was David J. Clymer, M.D. However, Dr. Clymer also indicated his opinions and ratings included some consideration of claimant's subjective complaints and he would

adjust his opinions accordingly if there were reason to doubt claimant's honesty. The Appeals Board finds there is good reason to question claimant's honesty.

The Appeals Board finds claimant is not a credible witness having misrepresented his identity, using false documents to obtain employment, and having lied under oath when asked about the work he had performed after leaving respondent's employment.

The Appeals Board finds it is more probably true than not that claimant has sustained permanent injury to his left shoulder which constitutes a 6 percent permanent partial functional impairment to the left upper extremity, left shoulder, and left shoulder musculature. Based upon the testimony of M. Ray Kenoyer, M.D., the serratus anterior, trapezius, and rhomboid muscles are part of the shoulder girdle and shoulder musculature. Therefore, the Appeals Board finds claimant is entitled to receive permanent partial disability benefits for a scheduled injury to the left upper extremity and shoulder as provided by K.S.A. 44-510d(a)(13).

The 6 percent functional impairment rating mentioned above is based upon the opinion and findings of Dr. Clymer who testified regarding the extent of claimant's impairment if he were to both exclude claimant's subjective complaints and rely exclusively upon the objective findings. Dr. Clymer was the physician authorized by Special Administrative Law Judge Leroy C. Rose to examine claimant and provide an unbiased and independent evaluation. He diagnosed claimant's left shoulder problems as chronic impingement and rotator cuff tendonitis.

The Appeals Board also finds claimant has not proven permanent injury or impairment to his back because those complaints are subjective only and claimant cannot be believed. As Dr. Clymer testified, if one did not consider claimant's subjective complaints he would have no impairment to the back.

(2) What is claimant's average weekly wage?

The Administrative Law Judge found claimant's average weekly wage was \$442.80. Claimant contends his average weekly wage is \$445.33 because he was expected to either work or be available to work on Saturdays. Respondent contends the correct average weekly wage is \$416.37 for the period from the date of accident to January 20, 1995. After January 20, 1995, respondent contends claimant's average weekly wage should be increased to \$451.70 because additional compensation items worth \$35.33 per week were discontinued.

Claimant testified that on the date of accident he earned \$8.75 per hour and worked ten-hour days. Although the record does not indicate how many days per week claimant regularly worked, he did testify he was expected to work on Saturdays.

Claimant's testimony is not supported by the wage statement that was admitted into evidence. The wage statement indicates claimant was earning \$8.55 on the date of accident and for the 26-week period before the accidental injury was paid for 150.59 hours of overtime based upon a 40-hour work week.

The Appeals Board finds the wage statement more accurately reflects claimant's earnings and the hours he regularly worked for the respondent. Because the wage statement does not support claimant's assertion that he regularly worked ten-hour days, the Appeals Board finds claimant's regular work week was 40 hours per week which, in the absence of evidence to the contrary, equates to five eight-hour work days per week. Therefore, the Appeals Board finds claimant's hourly wage rate on the date of accident was \$8.55 which produces a daily rate of \$68.40 and a weekly rate of \$342.

During the 26-week period before the December 9, 1994, accident, claimant earned a total of \$1,939.67 in overtime. However, claimant did not work one of those weeks and, therefore, claimant's average weekly overtime equals \$77.59.

Based upon the above, the Appeals Board finds claimant's average weekly wage for the period between the date of accident and claimant's termination on January 20, 1995, is \$342 plus \$77.59, or \$419.59. However, once respondent discontinued claimant's additional compensation items, claimant's average weekly wage increased by the value of those items, or \$35.33, making claimant's average weekly wage \$454.92 commencing January 20, 1995.

Based upon the above, the award entered by the Administrative Law Judge should be modified to reflect an average weekly wage of \$419.59 before January 20, 1995, and an average weekly wage of \$454.92 on and after that date.

(3) Was it proper to permit respondent's attorney to personally appear at oral argument before the Appeals Board when claimant's attorney appeared by telephone?

Claimant argues the Appeals Board erred by allowing respondent's attorney to personally appear at oral argument when claimant's attorney appeared by telephone. The Appeals Board finds claimant's argument to be without merit.

Oral argument before the Appeals Board was held on May 28, 1997. Before that date, respondent's counsel wrote claimant's attorney and advised that he would travel to Topeka to personally appear at the hearing. Respondent's counsel personally appeared at oral argument; however, claimant's attorney appeared by telephone. Before the hearing both counsel had prepared and presented their briefs to the Appeals Board addressing the issues on appeal.

The Appeals Board finds claimant's counsel was adequately apprised that respondent's attorney intended to personally appear before the Appeals Board at oral argument. No unfair advantage was gained by respondent's attorney's presence at oral argument and the Appeals Board is hard pressed to find that claimant was prejudiced in any manner.

When considering all of the facts and circumstances, the Appeals Board finds claimant's objection to respondent's counsel personally appearing at oral argument should be, and hereby is, overruled.

(4) Should respondent be prohibited from using a videotape to impeach claimant which shows him working after his termination from respondent's employment?

At claimant's deposition taken on August 20, 1996, claimant was asked if he had worked at the Pancake House in Dodge City or any other business around that location after leaving respondent's employment. After claimant denied that he had, respondent played claimant a videotape that showed claimant carrying a bucket of grease to a dumpster. Claimant then admitted he was the individual shown on tape and that he had worked at the Pancake House but under another name. At the time of the deposition, claimant objected to the use of the videotape because it had not been provided to claimant in response to an earlier request for production of documents.

Although the Workers Compensation Act does not contain formal rules of discovery, K.S.A. 44-549 provides that the Director and, by implication, the administrative law judges have the power to compel "the production of books, accounts, papers, documents, and records to the same extent as is conferred on district courts of this state under the code of civil procedure." K.A.R. 51-3-8 provides that the "parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case" prior to the first hearing. Also, see K.A.R. 51-9-10 which contains certain production requirements directed to health care providers and K.S.A. 44-5,120 which makes concealing a material fact a fraudulent and abusive act.

Under the circumstances presented, the Appeals Board finds respondent neither violated a provision of the Workers Compensation Act nor an order of the Administrative Law Judge in failing to disclose the existence of the videotape. Respondent used the videotape to impeach claimant's testimony only after he had lied under oath.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Decision dated December 6, 1996, and Order Nunc Pro Tunc dated December 9, 1996, both entered by Administrative Law Judge Kenneth S. Johnson should be, and hereby are, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Leobardo Chavez, aka Ruben Gonzalez, and against the respondent, HyPlains Beef, L.C., and its insurance carrier, Wausau Insurance Companies, for an accidental injury which occurred December 9, 1994, and based upon an average weekly wage of \$419.59 for the period before January 20, 1995, for 5.86 weeks of permanent partial disability compensation at the rate of \$279.74 or \$1,639.28, and based upon an average weekly wage of \$454.92 for the period on and after January 20, 1995, for 7.64 weeks of permanent partial disability compensation at the rate of \$303.30 or \$2,317.21, making a total of 13.5 weeks of permanent partial disability compensation for a 6% loss of use of the arm, including the shoulder joint, shoulder girdle, shoulder musculature, and shoulder structure, making a total award of \$3,956.49.

As of June 4, 1997, there is due and owing claimant 5.86 weeks of permanent partial disability compensation at the rate of \$279.74 per week or \$1,639.28, followed by 7.64 weeks of permanent partial compensation at the rate of \$303.30 per week in the sum of \$2,317.21 for a total of \$3,956.49, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board hereby adopts the orders set forth by the Administrative Law Judge in the Decision to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director